No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and E. H. MAYER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING OF THE CAUSE.

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Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The plaintiffs in error respectfully ask that this cause be reopened for further argument, to the end that a resubmission and a fuller consideration may be had. The plaintiffs in error are American citizens, entitled to the protection of the Federal Constitution, and they have in mind the real protection intended by the Fifth Article of the Amendments to the Constitution, enjoining that no person

shall be deprived of his liberty without due process of law. These defendants have not had due process of law. They have not had the trial according to law to which they are entitled. They have sought to point out to this court wherein the process to which they were subjected in the court below fell short of the due process which is theirs of right. The opinion of District Judge Rudkin, it is to be said with respect, curiously and singularly misses or confuses the point.

It is said in the opinion, touching the indictment:

> "It must be conceded that the charge is very general, and we cannot yield our assent to the claim on the part of the Government that an indictment in cases such as this need only charge in general terms a conspiracy to defraud the United States. Keck v. United States, 172 U. S. 434."

The indictment, says Judge Rudkin, was not objected to below, by way of a pleading thereto, or an objection at the trial, or a request to charge, and the plaintiffs in error were not misled to their prejudice. But if an indictment should allege one thing and the proof should go to another and different thing, with no proof of the thing alleged, we do not understand the pertinency of a suggestion that the defendants, in the trial court, made no objection to the indictment, or to the introduction of testimony, and offered no request for special instructions. The government may not prevail on one conspiracy—the conspiracy it alleges in the indictment—by attempting to prove some other

conspiracy, not alleged. Judge Rudkin proceeds to say, however, that as plaintiffs were not misled to their prejudice—unprejudiced, are we to assume, because they were charged with one thing and convicted of another?—"we think the charge," he continues, "though general in terms, and entirely lacking in particulars, was sufficient".

This, we say it with proper deference, is wholly to miss the point. If there was one thing we tried to point out to this court, it was that the charge here was not general in terms, that it was not entirely lacking in particulars. Quite to the contrary. The charge was specific, it was limited and carefully identified by particulars. And we invoked the rule that the government was held to the specific conspiracy alleged, to the particulars of the fraud set forth as descriptive of such conspiracy, and that such descriptive matter "must be proved as laid" (*Potter v. U. S.,* 155 U. S. 438, 445). This rule was carefully stated by us at pages 109-113 of our brief, under the heading: "Authorities as to particularity of allegation"; and the authorities were not simply cited by us, they were quoted from. There should not have been any oversight or confusion or misunderstanding, and yet, as must be apparent from the opinion as just noted, this is just what has happened. We took this indictment and examined it, and analyzed it, in our brief, at pages 14-20, and what did we show, and what does that indictment reveal?

The charge made is not, as Judge Rudkin mistakenly assumes, "general in terms and entirely

lacking in particulars"; not by any means. It is specific in terms, and identified by descriptive particularity. It charges the defendants with conspiring to defraud the United States—not in general terms, however, but, to use its own words, "in the manner following, that is to say:"

What is this descriptive particularity? We went over that indictment, word for word, industriously italicising and commenting upon the items of particularity. See pages 14, 15, 16, and 17, of our brief. And we made it clear—the indictment made it clear for us, we invite the closest scrutiny of the point, that the descriptive particularity of the fraud which the defendants are charged with conspiring to commit—whether in the importation at the dock or in the deliveries from barge to steamship—was the manipulation of the scales used in the weighing of dutiable or drawback coal, "to the end that said *scales* should record the *weights* of said coal desired by the defendants, and not the *true weights* of the coal *placed thereon*". Judge Rudkin's opinion concedes, and upon the authority of the *Keck* case in the Supreme Court of the United States (172 U. S. 434), that a charge of conspiracy to defraud the United States, couched in general terms, is insufficient. But if the particularity, descriptive of the conspiracy alleged here, and giving it character and identity, had been undue, if the indictment had been unnecessarily descriptive, "even the unnecessary description must be proved as laid"—as the Supreme Court of the

United States admonishes us in *Potter v. U. S.*, 155 U. S. 438, 445.

> "Where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime; * * * in other words, where the allegation is descriptive of the offense, the guilt of defendant must be found, *if at all,* upon the ground alleged in the information or indictment."
>
> *Randle v. State,* 12 Tex. Cr. App. 251, Brief for Plaintiffs in Error, pp. 112-113.

The opinion of Judge Rudkin appreciates the approximative and inherently inexact nature of the process of weighing coal, whether imported coal at the track scales on the dock, or drawback coal on the barge scales. We quote from the opinion:

> "The coal passed from the hoppers into cars on these tracks and the cars when loaded were drawn onto the scales by electric power and weighed by a government weigher, the weights being taken by the weigher and also by a representative of the Western Fuel Company, usually the plaintiff in error Mayer. As soon as the cars were weighed they were taken to the different bunkers or to the yards and unloaded as Mayer might direct. In the coaling of the vessels of the Pacific Mail Steamship Company and others the coal was laden on barges from the off shore bunkers and discharged from the barges into the ship's bunkers by means of buckets having a capacity of half a ton or upwards. The government weigher was supposed to weigh one bucket in

fifteen, or a round of four buckets in sixty, and the remainder of the buckets were then averaged up with the buckets thus weighed for the purpose of ascertaining the entire quantity of coal discharged into the vessel. The weights taken by the government weigher were also taken by a representative of the Steamship Company and upon these weights the drawback was paid to such vessels as were entitled to claim a drawback under the law. Up to this point there is little or no conflict in the testimony."

Judge Rudkin proceeds:

"It must not be understood, however, that the results obtained are anything more than *approximate.* The parties were dealing *with a base commodity where strictly accurate weights were not taken or required.* The coal was wet down from time to time to lay the dust or to prevent spontaneous combustion and was at all times exposed to the elements. The difference between the invoice weights and the out turn weights indicates but little in view of the fact that in many instances the coal was not actually weighed at the foreign port. In a majority of cases the weight was merely estimated by the ship's scale or by the draught of the ship. How accurate this is we do not know; but evidently *it is only an approximation.* The fact that a number of tons or a certain percentage was added to the weight thus ascertained does not remove the element of uncertainty. It also appears that the import coal discharged from vessels was weighed on a rising beam. Of course if the weights were accurately taken the difference between a weight taken on a rising beam and a weight taken on an even beam would be slight; *but much would depend on the care and skill of the operator.* On the other hand, in the discharge

of coal from barges to vessels *the shovelers on the barges had more time to fill the buckets weighed than those which were not weighed by reason of the delay incident to the weighing, and naturally the former would weigh heavier than the latter.* If there was nothing in the case beyond this *we would have no hesitation in declaring that the government failed to make a case for the jury,* and it is upon this claim that the principal assignment of error is based. For whether the discrepancy in the weights was caused by the elements; by flooding the coal with water; by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally *unless they took some part in bringing these things about.*"

We take this language of the opinion as an acceptance of the positions which we maintained, on full discussion, in our brief, and which were summarized by us at pages 49-50, in these words:

"It is now submitted:

"(1) The existence of an overage, or overrun, of the coal in stock, in excess of the custom house weights, by 2.8 per cent, so far from being a fact 'which excludes every other hypothesis but that of guilt' (Union Pacific Coal Co. against United States, 173 Fed. p. 740), was a normal condition, inherent in the business, 'as consistent with innocence as with guilt' (Union Pacific Coal Company against United States, supra), consistent, indeed, with no other interpretation but that of innocence.

"(2) The existence of a difference, or net shortage, as between the invoice weights and the custom house weights, by less than 1%, so far from being a fact 'which excludes every other hypothesis but that of guilt', was a normal

> condition, inherent in the business, 'as consistent with innocence as with guilt', consistent, indeed, with no other interpretation but that of innocence.
>
> "It will not be said, then, that James B. Smith, or his co-defendants, were in a conspiracy to cheat the government out of import duties, or out of drawbacks, because there was an overrun in the coal stock, or a want of conformity between the invoice weights and the custom house weights; or because James B. Smith, or his co-defendants, knew, what every custom house officer knew, what every coal importer knew, that coal in stock did overrun, and that custom house weights did not coincide accurately with invoice weights."

Now, then, what happens with the opinion? It proceeds to glance at the testimony. It overlooks completely the settled rule, already quoted, that

> "where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime";

and goes on to associate and confound circumstances forming part of the descriptive identity of the offense charged, with circumstances not alleged at all in the indictment. That is to say, it refers to the smuggling of coal into the bunkers *without being weighed,* to the condition, also, of the *unweighed* buckets delivered from the barges to the steamships, and to the records kept by the defendant Mills of such deliveries—all this, a matter of unweighed coal in which the fraudulent manipulation of the scales in respect to the coal placed

thereon, had no lot or part whatever; and in the same connection, and as part of the same immediate context, it refers to the exposed rod incident and to the bent link incident as being circumstances which "caused *inaccurate weights* to be taken"; and the conclusion expressed is, that the United States was defrauded, to an extent at least, "by reason of the fact that a portion of the imported coal *never reached the scales, was never weighed,* and that no duty was paid thereon", and, second, the United States was defrauded, to some extent, "by reason of the fact that it paid drawbacks to steamers entitled to claim drawbacks for coal, in excess of the quantity actually delivered to them"; although it is not pretended in any quarter that, in respect to the drawback steamers, there was any fraudulent manipulation of the scales in respect to the weight of the coal placed thereon. This is a curious state of affairs, we say this with great respect; it is a curious misconception, it must have been an oversight, on the part of the writer of this opinion. The settled rule of law limited this court, in examining the sufficiency of the evidence, to those circumstances of descriptive particularity alleged in the indictment; and the only particulars alleged in the indictment, and they were alleged over and over again, with tiresome iteration, were the circumstances descriptive of the fraudulent weighing of coal which had been placed upon manipulated scales. The smuggling of unweighed coal into the bunkers, or the delivery of unweighed coal from the barges, or any insufficient delivery of contract coal, unweighed, from barge to steam-

ship, were beside the question, were not alleged in the indictment—that indictment turned on weighed coal, on coal that was placed upon scales, not upon unweighed coal at all. The indictment is an obvious reflection, as we pointed out at pages 17, 18 and 19 of our brief, of the pleading in the *Heike* case, 192 Fed. 83, 91, and yet this opinion, without apparent appreciation of a settled rule of law, and of a distinction fundamental to the case, confuses weighed coal and unweighed coal, as if it was all equally responsive to the indictment, and assumes to find, in this fallacious aggregation of incongruous and disparate elements, a basis for the affirmance of this judgment.

There were three incidents in the case which had to do with weighed coal, with coal "placed on the scales"—the bent link incident, the exposed rod incident, the scales block incident. These three incidents happened in 1905, eight years before this indictment was found, and it is well enough to note, they happened on the Mission Street Dock, not upon the Folsom Street Dock, where, as the opinion recognizes, the principal operations of the Western Fuel Company were conducted. We appeal at once to the mind and conscience of the writer of this opinion—if he had observed the rule of law, appropriate to this indictment, and had limited himself to these three incidents, could he have said, as a magistrate administering due process of law, that such things, together or separately, were any evidence worthy the name, let alone satisfactory evidence, that Mr. Smith, Mr. Mills and Mr. Mayer had entered into a conspiracy, and, for three years

next before the filing of this indictment had been engaged in carrying out a conspiracy, to defraud the United States by the manipulation of the scales on which dutiable and drawback coal had been placed by them to be weighed? The scales block incident was so completely exploded (see our brief, pages 81-96), that the opinion of Judge Rudkin does not mention it; but the opinion does speak, in a fugitive way, of the exposed rod and the bent link. This is the language:

> "There was further testimony tending to show that Mayer pressed his foot or leg against the scale rod from time to time, thus preventing the Government Weigher from taking accurate weights, and that he was cognizant of the existence of a bent link between two of the cars, which likewise caused inaccurate weights to be taken."

This is the beginning, middle and end of the opinion to this point. The exposed rod incident was fully ventilated in our brief at pages 50-74. It did not take 24 pages, however, to dispose of the incident. That was the first discussion in our brief of the testimony of David Powers, and the history and character of that witness took some space. The net result of his testimony was, that he saw Mayer, with his foot against the exposed rod, several times in 1905, at Mission Street Dock; and he identifies the year and the dock by reference to the ship "Dumbarden". The government officer Freund, as we show very fully, fixes the time of this incident "before the fire of 1906" (our brief, p. 72).

> "If I remember," says Mr. Freund, "when I worked there the first few times the rod was

> exposed; then I was away for a time, and when I came back *I found they had boxed it in.* I am acquainted with the defendant, Eddie Mayer, and have known him since I have been in the service. I recall *an occasion* when he was located in the scales-house at the Mission Street dock and permitted his feet to come in contact with that *exposed* rod. I don't know exactly when that occurred, but I think it was just *before the fire of 1906''* (our brief, p. 72).

Freund tells of rubbing the rod with a piece of chalk, and afterwards of noticing some chalk mark on Mayer's trousers—that is the whole incident:

> "'Eddie,' I says, 'where did you get the chalk on your pants?' And he says, 'Darned if I know'. 'Well', I says, 'you want to keep your leg away from the rod and cut out your monkey business', and he laughed and called me a lobster, or something, I have forgotten which, *and I simply told him that; that was the end of it, I never bothered with him after''* (our brief, p. 72).

As Freund says, "that was the end of it, I never bothered with him after". The rod was boxed in, and it had been boxed in for eight years when this indictment was returned.

The bent link incident is fully considered in our brief at pages 74-81. It also happened at Mission Street Dock, and in 1905 also, it was a mere accident to the coupling of the coal cars, in the wear and tear of the business, and as soon as attention was called to it, as the government witness Freund tells us, "Mr. Mills or Mr. Smith, I don't recol-

lect which, immediately ordered that a longer link be put in''. We quote the following summary from our brief, at pages 96-97, and, once more, in the most straightforward and respectful way, we put it directly to the judicial conscience of the learned writer of the opinion, if that summary can be fairly gainsaid:

> ''There are, then, these three incidents in the record: the exposed rod incident, the bent link incident, and the scale-block incident. And this is the evidence upon which the government attempted to sustain the charge of a *specific conspiracy,* notified to these defendants in the indictment, a *conspiracy* for the manipulation of the scales used in the weighing of dutiable coal, 'to the end that *said scales should record* the weights of said coal desired by the defenddants, and not the true weight *of the coal placed thereon'*. The exposed rod incident was back in 1905. It was at one of the docks only, and that was Mission Street dock. It was a matter pertaining to the defendant Mayer alone, Mr. James B. Smith and Mr. Mills had no connection with it, it was a thing between Mr. Freund and Mayer, and after Freund had spoken of it, the exposed rod was boxed in. The bent link was also an occurrence of 1905, and upon one dock only. It seems to have come about in the partial derailment of the weighing cars, more or less unavoidable, and indeed, the supply of new links was part of the duty of the Fuel Company's machinist and his helper. Mr. Smith and Mr. Mills are mentioned in connection with this incident, but to this extent only, that when the matter was brought to their attention, they promptly saw to it that the difficulty was corrected. The scale-block incident, with the settling down of the platform, was also an incident of 1905, at one of the docks

only, and it is fully explained, without blame upon anyone" (our brief, pp. 96-97).

Mayer, alone, in any event, and from any point of view, could not have been guilty of conspiracy—conspiracy means partners. James B. Smith and F. C. Mills, to use the words of Judge Rudkin, "are not answerable criminally unless they took some part in bringing these things about". If any part they took, it was not in bringing these things about; it was in correcting and repairing them, and at the time and on the spot.

It is said by Judge Rudkin, after explaining the approximative character of the coal business, so far as the weighing of such a commodity is concerned, and the inherent impracticability of getting accurate weights:

> "If there was nothing in the case beyond this, we would have no hesitation in declaring that the government failed to make a case for the jury, and it is upon this claim that the principal assignment of error is based. For whether the discrepancy in the weights was caused by the elements, by flooding the coal with water, by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally unless they took some part in bringing these things about."

What is there in the case, we ask, beyond this, and within the allegations of this indictment, when properly understood, except these three incidents at the Mission Street Dock, in 1905, and is it not

clear that this court should have "no hesitation in declaring that the government failed to make a case for the jury".

In the undiscriminating association of circumstances in this opinion, of particulars relative to the weighing of coal with particulars relative to coal that was never placed on the scales, reference is made—in manifest error, we must be pardoned for speaking frankly—to the smuggling of unweighed coal into the bunkers, and also to the discharge of unweighed buckets from the barges into the steamships, and to the records kept by Mills of the barge deliveries. We give the language of Judge Rudkin, and it will be seen at once that he is dealing with unweighed coal.

> "There was direct and positive testimony," he says, "tending to show that at the Folsom Street docks, coal was shoveled into the bunkers from the tracks *without being weighed;* that coal was run from the chutes or hoppers into the bunkers *without being weighed;* and that train loads of coal were passed over the scales and dumped into the bunkers, *without being weighed*".

A reference is also made, in an earlier part of the opinion, to the removal of the old permanent planking at the docks, and to the substitution of temporary planking, but it does not seem to have been noticed that this was done in the reconstruction, at great expense, of the bunkers, in enlargement of storage capacity, and that it was the duty of the employes, when ships were discharging, to

put down this temporary planking (our brief, pp. 122, 123); and this from the government witnesses themselves; yet, strangely enough, the opinion remarks that

> "this temporary planking could be moved and replaced by the employes of the company from time to time, *but for what purpose does not appear*".

The language of the opinion, pertaining to the barge deliveries, is as follows:

> "There was also testimony tending to show that in discharging coal from the barges into the vessels of the Pacific Mail Steamship Company, the buckets weighed were filled to overflowing, while the *unweighed* buckets were little more than two-thirds full; there was testimony tending to show that this practice was pursued continuously and uninterruptedly."

The record shows, by actual experiment in the presence of Judge Dooling and the jury, that buckets only two-thirds full, would not "trip", and it is said by Judge Rudkin himself, at another place in the opinion, and in a spirit of fairness which we acknowledge and appreciate:

> "In the discharge of coal from barges to vessels, the shovelers on the barges had more time to fill the buckets *weighed,* than those which were *not weighed* by reason of the delay incident to the weighing, and naturally the former would weigh heavier than the latter."

Certainly, little short of this could be said, in view of the testimony of the government witness, Edward Powers:

> "Q. To what do you attribute the fact, Mr. Powers, if it be a fact, that the tubs that are weighed have some more coal in them than the tubs which are not weighed?
>
> "A. *Well, I attribute that to the fact that they have more time to put it in*" (our brief, p. 196).

It is said, however, in the opinion,

> "that instructions to that effect were given on at least one occasion by the plaintiff in error Mills in relation to another vessel".

But this has no reference to the transactions or to the vessels in evidence. It refers to an incidental remark made by Edward Powers, not to the Pacific Mail Dock, at all, but to the transport dock, and there was no evidence in the case touching any delivery from a barge into a transport vessel. Says Powers:

> "On the transport dock—Mr. Mills told me to underload the tubs; on the transport dock, *not on the Pacific Mail Dock*" (our brief, p. 206).

To the contrary, Powers says, touching the Pacific Mail Steamships, that Mr. Mills told him not to have any trouble over there, in respect to loading the tubs (our brief, p. 204). And he says further, that he never received any instructions from Mr. Smith or Mr. Mills to overload or underload tubs, and he repeats that Mr. Mills told him not to have any trouble over there in loading the tubs (our brief, p. 202).

The opinion next refers to

> "the books and records kept by Mills," as frequently showing "a great disparity between the

> quantity of coal laden on the barges and the quantity of coal discharged therefrom; that reports showing these discrepancies were made daily to the plaintiff in error Smith, and to the Western Fuel Company, and that each and every one of the plaintiffs in error were fully cognizant of these discrepancies, and it is not going too far to say that they were equally cognizant of the causes that produced them".

"The books and records kept by Mills", means simply a rough blotter kept by Mills, with no pretensions to accuracy, and which misled the government agent Tidwell himself into some serious blunders of computation. This is fully explained in our brief at pages 170-181. Mr. J. B. Smith never examined these dock books of Mills, never looked at them except cursorily, and would not have been surprised if he had found overruns, for overruns, as Judge Rudkin clearly points out, are inherent in the business. In fairness to Mr. Smith, and to repel any inference unjust to him which might be drawn from the language of the opinion, we quote his testimony as given at pages 181-2 of our brief:

> "Mr. Mills, as well as all the other employees, send reports to my office. I receive reports from every department of the business. From six to eight such reports are turned into my office every day. I do not necessarily look at Mr. Mills' reports daily. I know that they are there if I wish to refer to them at any time. I have certainly, in looking at them, observed overruns in connection with the barges. The overruns showed upon these reports certainly did not excite any surprise or suspicion in my

mind, because, when we first commenced the business of the Western Fuel Company, Mr. Mills explained the method in which they handled the coal in the barge department. I also knew that the weights going into the barges were not accurate. I knew that the barges were merely floating vessels used for the storage of coal and, therefore, we were not particularly interested in keeping accurate weights of the coal laden upon the barges. *All we desired was the approximate weights, because we knew that finally the coal in the barges would find a weight in connection with its discharge.* It could not really have made any particular difference to us whether the coal was weighed at all when it went into the barges. All that coal was the property of the Western Fuel Company. Nobody else had any interest in it. It was not any more important to us to have accurate weights of that coal than it would be to have accurate weights of the coal in a particular bunker or yard belonging to the corporation. *The only thing, therefore that really indicated the overrun to me was the annual stock-taking account.* * * * I never in my life examined the so-called 'Mills' dock books or diaries' covering the years 1906 to 1912. In answer to the question whether it is possible I never looked at those books at all to ascertain the overage or the shortage, or the quantity of coal charged up against a barge, etc., I would say that, as I explained in my direct examination, *we were not interested and I was not interested in the quantity of coal that went into the barges;* all that I cared about *was the final weight that was charged against the vessels or people that were receiving coal from our barges.* The barges were simply floating storeships with scales adjusted on them to ascertain *the delivered weight* the same as the platform scales down on the street to as-

> certain the quantity of coal delivered out from the yard. I suppose I knew Mr. Mills was keeping those books because they were there on his desk, but I never examined into their contents nor was I interested in their contents. They were his own method of keeping account down there to his own satisfaction. As manager I was, of course, interested in the manner in which every department was run, but it was not necessary for me to, and I did not, ask Mr. Mills why he made entries in those books. *His purpose, as I understood it, was only to keep a general idea of the amount of floating storage we had* so as to be able to know from day to day what position we were in to meet the requirements of steamers calling for coal."

We have so far noticed these matters, not germane to the descriptive particulars of the indictment, by way of answer to some of the statements contained in the opinion. We have discussed these extraneous matters *in extenso,* in our brief, at pages 115-290, not because they fell properly within the purview of the indictment, but in exoneration of these defendants from any imputation that they were parties to a conspiracy to defraud the United States, whether alleged or not. We did this, as we say explicitly in our brief (p. 115) "regardless of the offense charged in the indictment, and with the full realization that the matter now to be propounded lies outside of any question made by this record for decision here". We cannot but believe that if a fuller consideration could have been given to the record as we have reviewed it, some of the statements in this opinion would not have been

made. We trust that, upon the only issue tendered by the indictment, we have made clear the error and oversight of the opinion. We now submit it as the proper course for this court, to order a re-argument.

The unfair and abhorrent practices on the part of some jurors in this case, were exposed on motion for new trial. The matter is fully presented in our brief at pages 290-329. The wrong done "could not be corrected by assignment of error for anything done in the course of the trial" (*Atlantic Coast Line Company v. Thompson,* 211 Fed. 889, 892). It was, as we have shown, upon the facts themselves and upon the decisions of the courts, including the highest court of the land, clear error for the trial judge, to deny a new trial in the circumstances. We call attention to the discussion of the affidavits of the jurors, at pages 294-307 of our brief, and we ask this court if the case is not one of "very plain circumstances indeed". We refer, now, as we did in the brief (pages 309, 314), to the language of *Mattox v. United States,* 146 U. S. 140, 149, 150; to the case of *Woodward v. Leavitt,* 107 Mass. 453, found at pages 315-316 of our brief; and to the case in this state of *Kimic v. Railway Co.,* 156 Cal. 397, quoted by us at page 317 of our brief. When the opinion of Judge Rudkin speaks of "very plain circumstances indeed", we beg to call attention to our discussion of the affidavits, and to the following language from *Meyer v. Cadwallader,* 48 Fed. 32, 36:

> "That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial, is a proposition so plain that it would be a sheer waste of time to discuss it."

We also call attention to *Morse v. Montana,* 105 Fed. 345, 346, 347, 348, conveniently excerpted at pages 322-326 of our brief; to *Callahan v. Railway Company,* 158 Cal. 994, 995, found at pages 326-7 of our brief, and to *People v. Loung,* 159 Cal. 526, 527, 528, found at pages 327-9 of our brief. As Mr. Justice Clifford said in the *Callahan* case:

> "Jurors must be kept free from all possible influence. When exposed thereto, it will not do to inquire into the probability of the extent of the influences, and their effect upon the verdict. There is no safety, except in setting aside the verdict in a case where acts and conduct are such that could have influenced the verdict."

And again:

> "It must be understood," citing the *Mattox* case from the Supreme Court of the United States, "that no verdict should be permitted to stand, against which, from established facts, the slightest inference rests that it bears the taint of improper influence exerted by or in behalf of the party in whose favor it is returned."

We have shown from the affidavits, what the circumstances were—they were "very plain indeed", and we point out the uncontradicted evidence which an analysis of the affidavits has disclosed. Such a

showing cannot be brushed aside or disposed of by some general phrase. As the Supreme Court of California said, through Mr. Justice Van Fleet, in *People v. Leary,* 105 Cal. 490, dealing with the precise wrongdoing complained of here in respect to the jury,

> "if the matter be such as would, from its character, or the manner or connection in which it is stated, be calculated to prejudice or injuriously affect the minds of the jury, a presumption of improper influence arises, and a new trial will be granted, without requiring defendant to show that harm has in fact been done his cause".

The right to apply for a rehearing in this court implies that at some time or other the occasion must arise when a rehearing should be granted. Otherwise, an application for a rehearing would be an empty form. This is a case which must appeal to the court as one to be reopened and reargued. The opinion in the case has misconceived the case and the point of the appeal; the error must, on further consideration, be apparent to the members of the court, including the writer of the opinion himself. We respectfully ask that the cause be reheard, and that ample time be afforded counsel for the full discussion, in open court, of the facts of this case, and of the law and the decisions by which its final disposition should be ruled. We trust that nothing contained in this petition will carry the

implication of any abatement from the high respect in which we hold the members of this court.

Dated, San Francisco,
April 10, 1916.

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Attorneys for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

P. F. DUNNE,
Of Counsel for Plaintiffs in Error and Petitioners.